Law and Morals: The Perennial and Necessary Tandem

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The relationship between law and morality has never been terribly clear in the American mind. On one hand, there has been the attempt simply to identify the two. On the other hand, there has existed a deep suspicion of all attempts to relate the two. Traditional Western jurisprudence, at least before Austin, tried to follow a middle course between these two extremes. It is particularly important today, when law occupies such an important dimension in American life, that lawyers once again reexamine this relationship. Law is infinitely more than procedural technique; but it is something less than a religion or an ethical system. Law presupposes an ethical system and attempts to maintain and promote that system in the concrete lives of citizens. Law is, above all else, a teacher. This essential core of a legal system often is forgotten, to the confusion and detriment of that system.

I.

"Morality" is only slightly less difficult to define than "law." We know, however, there is an intimate and inextricable relationship between the two. It is like defining the relationship between church and state: the relationship is clear and the balancing delicate; if one is absorbed in the other, the result is tyranny, or superstition, or both. One cannot be absorbed by the other and if it is, we have neither church nor state.[1] The relationship of law and morals, similarly, is one of tandem and tension.

Both law and morals concern who and what man is, that is, human existence. Although wolves do not argue about the merit of running in packs, man always argues about, and seeks to define, his existence. It is this very quest that defines man as human. Man is free, therefore he is responsible and moral; man relates to others in community, therefore he needs law whereby

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1. P. Riga, Give Unto Caesar What Are God's: The Christians and Political Life 51 (1973).

his freedom and his relationships can be channeled for their maximization.[2] Freedom and law are both a possibility and a limit. That is what the medieval schoolmen meant when they said that man achieves his highest freedom only under law; *homo liber et legalis.*[3] Without law, man falls into the confusion of anarchy or into the tryranny of the stronger.

To be free does not mean the ability to choose one course of action over another; to say man is free to choose in this way really means that these choices are acts of will that aim at achieving a certain end, and to which man bends his energies or focuses his enthusiasms. But all these acts of will we call expressions of freedom, already presuppose man understands what freedom is. To be free is to be able to find meaning and give significance to our existence.[4] Law is one aspect of that endeavor in that law embodies the moral values that give a society significance and meaning in history.

It should therefore be clear that any and every law imposes some moral vision, explicit or implicit, against which the law is judged. It is not true to say the law itself is morally indifferent even though the various principles of interpretation and application might well be. Law always refers to some moral vision. The law is teacher to the extent it instructs us about the moral order we hold as a society. Morality and legality are mutually dependent phenomena in every society. And because man is a limited being, he can only be *legally* free.

Man is limited in relation both to himself and to others; it is here we encounter the relationship between morals and law. Law regulates relationships of diverse kinds: for example, persons, groups, families, property, estates, crimes, and commerce. Man does not possess unlimited freedom, but freedom in relationship to other human beings who are his moral and legal equals under

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2. Thomas Aquinas speaks of this polarity of freedom and relatedness:

> Now among all others, the rational creature is subject to Divine Providence in the most excellent way, insofar as it partakes of a share of Providence, by being provident both for itself and for others. . . . [T]he Psalmist . . . thus implies that the light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, is nothing else than an imprint on us of the divine light.

AQUINAS, SUMMA THEOLOGICA I-II, q. 91, art. 2 [hereinafter cited as SUMMA THEOLOGICA]. Man is therefore both free and responsible.

3. *See, e.g.*, WILLIAM OF OCCAM, DIALOGUS I-VII, ch. 73. For an overall view of this medieval theory, see G. DELAGARDE, LA MORALE ET LE DROIT 48-67 (1949).

4. For a fuller development of this thesis, see M. HEIDEGGER, BEING AND TIME 401-24 (1962).

the law. Here lies the touchstone of the whole democratic legal system, which becomes legitimate only by the consent of the governed. The people have to first consent in some way to give any human meaning to laws.[5] Thus, the relationship between law and morals touches a profound cord in human evolution. Man is free, but limitedly free; man in freedom relates to his equals in freedom, but is limited by the very nature of the freedom and the relationship. Therefore, the nature of human relationships demands law; without law there is no freedom, only the rule of the strongest.

All of this is not terribly novel to Americans living under limited government, each equal to one another *under the law.* Lawful freedoms are always possessed in association with one's fellows. The American notion of the relationship between law and morals was not concocted from the top of the brain rationalism of the eighteenth century (*Aufklärung*) which purported to start *de novo.* Rather, it reflects a historical product, woven through the bloody pages of history: the concept of limited freedom under limited government under law freely consented to by individuals who only through this consent become a people. In a true sense, this people rules itself.

The American proposition, in reviving the distinction between society and state that had perished under Absolutism, likewise renewed the principle of government's incompetence to legislate religion and thought. Government submits itself to judgment by the truth in society; it is not itself a judge of the truth in society. Freedom of the means of communication, whereby ideas are circulated and criticized, and the freedom of the academy (the range of institutions organized for the pursuit of truth and the perpetuation of the intellectual heritage of society), as well as the freedom of the church, are immune from legal inhibition or governmental control. This immunity is a civil right of the first order, essential to the American concept of a free people under a limited government. Its shorthand version is the first amendment to the United States Constitution.

II.

The very notion of a "free people" has a special meaning in the United States. Part of the inner structure of the American ideal of freedom, as old as Western jurisprudence itself, has been the profound conviction that only a virtuous people can be free.

5. *See generally* A. BERLE, POWER WITHOUT PROPERTY 18-24 (1959).

It is not an American belief that free government is inevitable; only that it is possible, and that its possibility can be realized only when the people as a whole are inwardly governed by recognized imperatives of universal moral law: "The constitution makes our conventional political morality relevant to the question of validity; any statute that appears to compromise that morality raises constitutional questions, and if the compromise is serious, the constitutional doubts are serious also."[6] The idea that only a virtuous people can be free is not novel to American jurisprudence; in Western Culture, that idea goes back to Plato and Aristotle.

The American experiment reposes on Lord Acton's postulate that freedom is the highest phase of civil society.[7] It also reposes on Lord Acton's further postulate that the elevation of a people to this highest phase of social life supposes, as its condition, that they understand the *ethical nature of political freedom.*[8] The people claim this freedom, in all its articulated forms, in the face of government; in the name of this freedom, multiple limitations are put upon the power of government. But the claim can be made with the full resonance of moral authority only to the extent it issues from an inner sense of responsibility to a higher law. In its highest phase of freedom, civil society demands that law should not be imposed from the top down, but should spontaneously flower outward from free obedience to the restraints and imperatives that stem from inwardly possessed moral principles. The success of a political experiment depends upon the virtue of the people who undertake it.

Likewise, institutions that would pretend to be free with human freedom must in their workings be governed from within and made to serve the ends of freedom. Political freedom is endangered in its foundations when universal moral values, upon whose *shared* possession the self-discipline of a free society depends, are no longer vigorous enough to restrain the passions of greed and shatter the selfish inertia of men.

As Learned Hand so ably stated:

> You may ask what then will become of the fundamental principles of equity and fair play which our constitutions enshrine; and whether I seriously believe that unsupported they will serve merely as counsels of moderation. I do not think that anyone can

6. Dworkin, *On Not Prosecuting Civil Disobedience,* in TRIALS OF THE RESISTANCE 53 (1970).

7. LORD ACTON, LECTURES ON MODERN HISTORY 26 (1960).

8. *Id.* at 27, 43-44.

> say what will be left of those principles; I do not know whether they will serve only as counsels; but this I think I do know—that a society so riven that the spirit of moderation is gone, no court *can* save; that a society where the spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.[9]

Hand is expressing the familiar jurisprudential axiom common in Western Civilization from Plato and Socrates, through Augustine and Aquinas: the health of a society depends not on the quantity nor even the quality of its laws, but upon the values the laws presuppose and express. When laws no longer express and embody these values, they become empty forms—social pathology. Both politicians and citizens today are thoroughly confused because they believe in nothing and they stand for nothing except self-serving and personal gain. This pathology results from an absence of common, shared moral beliefs about the role of man in society.

More seriously, when a people can no longer agree on objective norms of right and wrong, this in turn does away with any agreement on the notion of justice that is the life blood of the laws. More and more in the United States, moral principles are considered quaint and philosophically meaningless, with the result that the spirit of the laws is fundamentally eroded. What is taking the place of the "force" of law is no longer its rightness but its actual coercive force, which is the nemesis of the truly free society.

The commitment to freedom requires self-discipline and sacrifice, and has always exemplified virtue in the lives of the mentors of society. Presently, this spirit in America is openly mocked, all the way from professional sports to taxpayer revolts. The gospel today is "self-gratification now," with "courts" beginning to rule and legislate over almost every aspect of life. This relegation of responsibility by the citizen to courts is formal at best, and the sign of lack of moral commitment at worst. The laws' values are first manifested in the quality of the citizens' lives, and only later can they be embodied in laws or a constitution. Reversing the process not only reverses the order of traditional Western jurisprudence, it places an unbearable weight on the laws and the courts. Collapse of a free society is then imminent.

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9. L. HAND, *The Contribution of an Independent Judiciary to Civilization*, in THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 164 (I. Dillard ed. 1960).

To put the problem in another perspective, what can hold citizens to their hard duties of personal responsibility, integrity, and obligation to the common good? Traditionally, it has been the life of virtue, manifested in the concrete lives of citizens and nurtured in families and in educational systems. It does little good at this point to state that our educational institutions teach nothing of civic virtue—when they teach at all.[10] More seriously, the fractured family life in America is in danger of a complete breakdown in teaching the young the fundamental moral values basic to a free and democratic society.

The recent Watergate event evidences this lack of moral dimension in modern society. Shame, the public acknowledgment of a moral or political failing, seems to be dead in those who perpetrated Watergate. Former prominent administration members, accused or convicted of common crimes, grow rich on profits from books and lectures. The former President blends easily into a position of elder statesman, receiving confidential information and giving advice on matters of state. Members of the intellectual and political elites, whose judgments on Vietnam proved consistently wrong and whose policies proved disasterous for the country, remain members of the elite in good standing. Thus, the demarcation between right and wrong, both morally and intellectually—with all the terrible consequences which that entailed in Vietnam and Watergate—is a minor accident, temporarily embarrassing and better forgotten by the country. Moral and intellectual indifference is accepted as the virtue of mercy. What is so terrible about these incidents of national disgrace is that there is no clear awareness of the difference between vice and virtue.

In fact, even the great "Civil Rights" Movement, which has expanded into almost every aspect of life—minorities, homosexuals, the handicapped, women, the mentally retarded, prisoners—has overlooked other important dimensions of the healthy society: responsibility, obligation, and duty, which are the result of virtue, discipline, and sacrifice—words seldom heard in the vast litigation about everybody's "rights." This is not to say, of course, that the Civil Rights Movement is not a positive good;

10. This was not always so. In the early 19th century, the Northwest Ordinance put it this way: "Religion, morality, and knowledge being essential to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Ordinance of 1787, 1 Stat. 51n (ordinance for the government of the Northwest Territory enacted by Congress on July 13, 1787), *reprinted in* H. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 128, 131 (9th ed. 1973). What remains today is only the last, which is itself seen as a substitute for virtue. Historically, of course, little correlation exists between intelligence and virtue.

only that society's progress in this area at all is in direct proportion to the virtue, decency, and compassion of all citizens—a spirit not nurtured in legislation or lawsuits, but in the quality of the citizens' lives. In this sense, Justice Frankfurter was on target when he said: "Civil liberties draw at best only limited strength from legal guaranties."[11] The protection of the poor, the minorities, and the physically and mentally handicapped resides first in the moral lives of free citizens and only then in the laws. Or as James Madison put it: "To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea."[12]

Law, then, intimately depends upon a people's moral sense. The jurisprudence of the Middle Ages was correct in thinking in terms of reconciling and harmonizing. It must be the virtue in the people and the people's ability to sacrifice for the common good that restrains man's natural self-seeking. Only this will ensure civil peace and harmony.

Civilized society cannot function effectively without peace and control. The weighing of competing claims, which is the basic function of courts and legal reality, cannot lead to peace unless the people morally are disciplined to self-sacrifice in the interest of all, so that *everyone's* claim and interest can be satisfied as much as possible within the narrow confines of limited resources. This perennial balancing of individual rights and social responsibility can, in a democracy, be reconciled freely only when a moral sense reposes in the people as a whole. When this is lacking, order is imposed from above by the choice of a few, and tyranny and authoritarianism results. That is why democracy is always so precarious and why it needs continuous reaffirmation: it depends for its survival on this moral sense of a people as a whole, not on order imposed from above.

Here lies the essential distinction between democracy and tyranny. If there is no compromise on the exercise of right, in view of the whole, if rights are carried to their logical conclusion without limitation, the pressure of unsecured claims and unsatisfied demands will continue until revolution occurs or the civil peace is destroyed and is again imposed from above by another and stronger group. This balance of individual rights and social responsibility and limitation, in a democracy, can only be bridged by the delicate moral sense of a people taught discipline and self-

11. Dennis v. United States, 341 U.S. 494, 555 (1951) (Frankfurter, J., concurring).
12. Speech delivered at the Virginia Convention, June 1788.

denial by a life of virtue; absent this morality, social order and peace will be imposed, destroying the former to preserve the higher value of the latter.

With the traditional undergirding of law (virtue) effectively undermined, *something* must take its place to insure the legal order's efficacy. What has resulted from the great Civil Rights Movement is that litigation and legislation have taken the place of moral attentiveness. Accordingly, litigation and the courts—with their own brand of social philosophy and juridical activism—began to rule society, from integrating schools and locker rooms to challenging the latest ban on certain foods and drink. The courts now are seen as the arena where civility and decency are nurtured, and the people are stripped of the ability to rule themselves and to determine their own destiny. The world of wrongs will be set right by even more litigation and more intervention by courts in the citizens' lives. The law's "force" will be the rightness of law passed and consented to not by the people and their representatives, but by orders of the courts. This new religion has its own Bible: the Constitution; it has its "decrees" issued by the courts for the salvation of all; it has its inspiration in the Court's interpretation—or more correctly, reinterpretations—of the Constitution's due process clause; it demands "obedience" to its orders and to the "rights" it "finds" in the Constitution; and it has its decalogue promulgated by "the Fathers" in the Bill of Rights. Finally, the citizenry must accept all this by faith in a Supreme Court which pronounces *ex Cathedra*. No medieval papacy could have asked for more than this secular religion. And no reasoning could be more circular.

The result is to put the cart before the proverbial horse. The law, or the Constitution, can instruct us about our moral—and only then, about our legal—responsibilities, but the law *presupposes* a sense of morality, virtue, and decency in the citizens. It does not and cannot create these senses contrary to the rush by lawyers and law students to set the world right by more and more litigation. Such is not the task of the law. The present backlash against the courts and their independence should be instructive in this regard.

A view of justice always precedes and underlies all legislation and orders of courts. We have forgotten Justice Frankfurter's vital insight when he said that "the ultimate reliance for the deepest needs of civilization must be found outside their vindica-

tion in courts of law."[13] It must be found in the concrete, moral lives of the citizen who lives these values before they can ever be legislated or ordered by courts; it is a reliance on agreed, moral values, concretely lived, on what the ancients called "virtue" that alone is the safe foundation of a free society's legal order. Citizens must agree not on vague notions of right and wrong, but on some very definite notions of what is objectively right and wrong. This, of course, does not preclude disagreements about concrete policies and applications, but if the moral foundation is not there, the legal order builds on shifting sand. Given the hedonism and "self-gratification now" philosophy so prevalent and deeply ingrained in American society, one wonders whether our free society can long endure. Perhaps this is unduly pessimistic, but one can see this lack of moral dimension in almost all the institutions supposedly responsible for its communication: the family, the schools, the government, the courts, and the service professions (law and medicine).

III.

These observations lead to the logical question of the law's moral foundation for only with such a foundation can the law lay claim to the citizens' allegiance. It is a profound question, one to which both the Judeo-Christian ethic and Greek philosophy give birth.[14] Every society of the ancient world—Roman, Assyrian, Egyptian, Macedonian—founded law on the divine prerogative of the King, Emperor, or Pharaoh. Although Plato and Aristotle attempted to give law a moral foundation that is found in the virtuous citizen,[15] neither claimed any higher foundation of law against which law would be measured regarding its moral, as distinguished from its valid, qualities. The Emperor's word was law because he was the viceroy of the Divinity. No other founda-

13. Dennis v. United States, 341 U.S. 494, 556 (1951).

14. *See* P. RIGA, *supra* note 1, at 22-50.

15. Next in order, . . . comes the principle that . . .

> the state which is morally best is the state which is happy and 'does well.' To 'do well' is impossible unless you also 'do right'; and there can be no doing right for a state, any more than there can be for an individual, in the absence of goodness and wisdom. The fortitude of a state, and the justice and wisdom of a state, have the same energy, and the same character, as the qualities which cause individuals who have them to be called brave, just and wise.

ARISTOTLE, THE POLITICS 281-82 (E. Baker ed. and trans. 1946)(footnotes omitted). The study of ethics may be termed a study of politics. ARISTOTLE, THE RHETORIC bk. I, ch. 2, para. 7, at 1356a. Ethics, according to Aristotle, may be so termed because politics is the art or science of producing a good community, and ethics is the art or science of producing a good man.

tion of law was needed. Christianity challenged the divine foundation of Caesar's legislative power by appealing to natural law or justice because a higher foundation of law was necessary if allegiance was to be expected of Christians living in the Empire.[16] But it also was clear that law itself could not be identified with the Divinity or God. Law itself is judged by reference to objective norms of right and wrong.

The American experiment was no exception to this Judeo-Christian Tradition. In the eighteenth century the Founding Fathers stated: "We hold these truths to be self evident that all men are created equal and that they are endowed by their Creator . . . ."[17] If the Founding Fathers were pragmatic in their dealings with government, they were not pragmatists for whom there were no truths. These writers of the *Declaration of Independence* held certain truths and claimed an Absolute as their foundation that gave the citizens' allegiance its basic moral character. This allegiance went to the underlying right of persons, not to the structure of a government whose function simply would be to insure these rights. When government no longer performed this ancillary function, it was a moral nullity and citizens had a moral obligation to overthrow it.

In an age when all this seems rather quaint and is rejected in legal and intellectual circles, it is crucial to ask, what is to be substituted in place of an objective moral order that will claim the same allegiance? If the laws and the Constitution are no longer linked with enduring moral norms, our national legal philosophy has become pragmatic and no longer worthy of the tradi-

16. For a fuller development, see Riga, *The Christian and Politics*, 12 WORLDVIEW 11-15 (Oct. 1969). The later Christians attempted to establish this political allegiance of Christians on more specific foundations. For instance, we have the testimony of the theologian-lawyer, Henry of Bracton: "*[N]ec [leges] a corona separari poterunt cum faciant ipsam coronam, quia leges faciunt regem.*" II DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 167 (G. E. Woodbine ed. 1922)(author's trans.: The King ought not to be under a man, but under God and under the law, because the law makes the King). St. Thomas Aquinas bases allegiance to law on fidelity to right reason which is the reflection of the divine in human life (natural law). That is why Aquinas calls law an "edict of reason": "*Rationis est enim ordinare ad finem, qui est primum principium in agendis . . . . Unde relinquitur quod lex sit ali quid pertinens ad rationem.*" SUMMA THEOLOGICA, I-II, q. 90, art. 1. In other words, God and law were somehow linked and law was judged as just or unjust in relationship to those norms of natural justice, natural law, etc. When allegiance to law is ultimately dependent upon the institutions of government or a majority of people (legal positivism) there can be no allegiance to law properly speaking. The only difference between an acceptance of slavery and its rejection would be 600,000 Civil War dead and the will of the greater force, not the vision that slavery was and is morally wrong.

17. *The Declaration of Independence* (adopted July 4, 1776, by the Continental Congress), *reprinted in* H. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 100 (9th ed. 1973).

tional allegiance of citizens. The basic question today is whether, rejecting appeal to civil disorder and anarchy, the legal order is or can be subject to the moral allegiance of citizens, and if so, on what basis. If "reverence for law" is based on what a Supreme Court says law is, or if the allegiance to law is based on the fact that it is the "value of values"[18] with no definition of that value, then we are both intellectually and morally bankrupt—we have no moral vision and the laws have no more force or allegiance for citizens.

The history of American governmental institutions as interpreters of law is much too spotty to lead to any other conclusion than that such a basis is precarious at best. Those who give an unqualified allegiance to the Constitution certainly do not mean the *original* Constitution, because it permitted slavery until 1808 and counted a slave as 3/5 of a free person for purposes of representation in Congress until 1865. Chief Justice Taney was historically correct when he said in the majority opinion of *Dred Scott*[19] that there was ample evidence that the Founding Fathers at the Constitutional Convention did not consider slaves as persons.[20] In this view, when law is stripped of its moral underpinnings, it is merely the product of specific government institutions that enjoy power under the Constitution. The slavery question aside, there are other, grievous moral aberrations that make one doubt the wisdom of an allegiance based on such a problematical foundation.

The history of the Indian nations is another example. In spite of *Worcester v. Georgia,*[21] upholding Indian treaties and Indian rights to lands in Georgia, when President "Sharp Knife" Jackson summarily removed all Indians beyond the Mississippi in 1832, there was no protest from the Court. In spite of the bloody Civil War and its Constitutional aftermath in the fourteenth amendment, the Court could find no evil in Louisiana's "separate but equal" treatment of black citizens.[22] The irrational fear and hatred of Mormons toward the end of the nineteenth century was confirmed by the Court in *Reynolds v. United States*[23] and *Davis v. Beason.*[24] Nor can any minority ever again be at perfect legal

18. A. BICKEL, THE MORALITY OF CONSENT 56 (1975).
19. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).
20. *Id.* at 404-05.
21. 31 U.S. (6 Pet.) 515 (1832).
22. Plessy v. Ferguson, 163 U.S. 537 (1896).
23. 98 U.S. 145 (1878).
24. 133 U.S. 333 (1890).

ease in the United States after *Korematsu v. United States,*[25] which sanctioned the removal, during World War II, of Japanese Americans who had not been convicted or even suspected of unpatriotic acts or sentiments from their homes and farms on the West Coast and their confinement to concentration camps in the interior of the country.

In these and many other instances, it should be clear that Bickel's "value of values" (law) and Holmes' view of law as the correspondence to the actual equilibrium of force in the community—that is, conformity to the wishes of the dominant power,[26] lack serious moral foundation for the allegiance of citizen to law. Indeed, they invite a cynicism of a *macht recht* variety where law is imposed by the *will* of a majority, or more specifically, by the views of a particular makeup of the Court's majority.

The Medieval legal legacy, on the other hand, founded law in intellect and reason, and depended for its ultimate validity and allegiance on something more solid than willful majorities or concerted minorities. The difference always was made between the *consensus* and the consent of the governed. Consent was a pragmatic step, to insure the self government of a people. Consensus involved principles, moral in nature and generally agreed upon by the people, upon which and for which they established a covenant in the first place. This societal covenant gave the people an identity and a direction in history, not least of which was a sense of community, that is, they shared something basic and profound. Given the multiplicity and grievousness of the errors of all branches of our government institutions, the rule of law, if it is to be worthy of the faith of citizens, must be something other than the *will* of those with power within a state, even if they are a majority. Repressive and unjust laws too often have seen birth in the Halls of Congress and too often have been given the Supreme Court's *imprimatur* for citizens to take Bickel or Holmes seriously. The only escape from this dilemma is to recognize that some connection must exist between law and enduring moral norms, in function of which the performance of government officials can be judged. Otherwise we are back to the *Kaisar Kurios* jurisprudence of the Judeo-Christian world, where some sort of vague faith in governmental institutions will insure the validity

25. 323 U.S. 214 (1944).

26. *See generally* Note, *Holmes, Pierce and Legal Pragmatism*, 84 YALE L.J. 1123 (1975). This view is not unopposed in American legal circles. John Rawls, for example, bases justice on a social contract theory and not on inherent rights that give dignity to each and every human being. J. RAWLS, A THEORY OF JUSTICE 158 (1971).

of, and the allegiance to, the law. No healthy, free society established on such a precarious foundation can long endure.

Some authors have seen this dilemma and have attempted to find a solution in a "due process" justification. As Charles Frankel put it:

> The aspiration towards it [liberal constitutionalism] is central in the assertion that all men should be credited with the rights to life, liberty, and the pursuit of happiness. These are not logically self-evident rights. They are not rights whose inviolability can be ascertained independently of any conception of the social purpose, ... But these rights will be self-evident in the quite ordinary, non-technical sense of the term, to men and women who wish to be independent, responsible, self-questioning human beings . . . .[27]

Thus, Frankel requires as much an act of faith as any natural law theoretician ever did. The short answer to this view is that there are hundreds of millions of human beings who would disagree. The logical answer is that such a foundation of faith in law is much too precarious and unsure to support any citizen's allegiance. As Frankel puts it, such a cultivation of this liberal constitutionalism permits the citizen to cherish this ideal of respect and openness to differing viewpoints, "taking its side when sides must be taken."[28] But this begs the very question under discussion: what are the values onto which the citizen is supposed to hold, for which he can "take sides" when necessary? Frankel sounds like Bickel, who was convinced that "we can as a society and a culture discover some boundaries"[29] to the meaning of the moral realm. But there is an absence of values within the American political and social system: we have no common moral vision or principles that define us as community and give us a direction in history. In short, as a nation, we believe in nothing communally so we believe "in the law." But this is sheer nonsense because law always is ancilliary to a basic moral value system that gives significance to the whole legal system. "Reverence for law" has become the new civil-secular religion, which attempts to unite the nation after every other moral vision has been lost or discarded. But "community" presupposes a people who share in common a moral vision and who can embody this vision in its legal order.

27. Frankel, *The Moral Environment of the Law*, 61 MINN. L. REV. 921, 960 (1977).
28. *Id.* at 959.
29. A. BICKEL, *supra* note 18, at 83.

Without moral vision, legal order is without meaning or foundation.

Law becomes tyranny when there is no recognition of man's authentic self in others, for then there is no sense of common origin and destiny, and no reason to come together to debate and decide the aims of society. Racism, bigotry, and nationalism kill community because they kill communality, that is, they kill what binds us together. It is only through communality that consensus grows and a moral vision is born that can give birth to a practical plan of action, politics, and law. Ethics, however, must precede politics, or rather, in the words of Aristotle, politics is the practical translation of our ethics.

IV.

This relationship of law and morals has never been terribly clear in the American mind. Legality and morality as two orders of reality frequently have been confused in either of two ways.

First, there is a profound failure in understanding the true meaning of the medieval adage: Whatever is right ought to be law.[30] The medieval man was not thinking of coercive statutes, enforced by the state, that would compel the people to do whatever is right.[31] He was merely saying that whatever is right ought to be a matter of custom; the moral order ought to be reflected in the habitual order of everyday life and action.

Medieval man could also in good logic turn the adage around and say: Whatever is law (custom) ought to be right. The sanction of the mores is not in the sheer fact that they prevail, *but in their rightness.*[32] As St. Thomas Aquinas would put it, it is right

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30. *See, e.g.*, SUMMA THEOLOGICA I-II, q. 91, arts. 1 & 2.

31. As this article stresses, the relation between law and morality is a complicated one. That there is such a relationship has been the constant tradition of the West for over seventeen hundred years. The law, said the medievals, exists somehow to make men better. *See generally* SUMMA THEOLOGICA I-II, q. 91, art. 2. If this is an exaggeration, surely there is none in saying that the law is in some way a teacher of good and not simply a threat of evil. To equate the illegal with what is immoral is surely an exaggeration since one can easily conjure up a situation where something is both legal and immoral (legalization of prostitution) and still be perfectly good law; and illegal but moral (as an employer in interstate commerce who would set up an independent retirement plan by diverting obligatory social security contributions). If this were not so, then the whole of the American tradition of civil disobedience to force attention to the *injustice* of the law, would make no sense.

32. Once again, the master in the field is Thomas Aquinas:

> Whether it belongs to human law to repress all vices?
> Wherefore human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to

to obey the law, not because it commands, but because what it commands objectively is right. In both cases, medieval man was expressing, quite exactly, a correct concept of the distinction and relation between the order of the moral law and the order of human law or custom. In American history, however, a perverted sense of the adage has been frequent. It chiefly appears in the reformer's constant shout: "There ought to be a law." That is, whenever it appears that some good thing needs doing, or some evil needs to be done away with, the immediate cry is for the arm of the law. There is often no pause to ask whether this is the sort of good or evil with which law can, or ought to, cope.

The other side of the adage is: Whatever is moral ought to be legislated. The simplicity of this adage reveals the failure to grasp the difference between moral precepts and civil statutes. Because law proceeds from and reflects a people's moral sense—no more, no less—law is a moral consensus of the people. Consequently, the "force" of law proceeds from its rightness and the consensus of the people, not from force. The law is seen to be right; therefore, it is obeyed. In obeying, the citizen exercises virtue, not constraint. But, because of the complexity of human existence, not every evil is susceptible of being remedied by law. When law attempts to be everywhere pervasive, it is nowhere effective except as form of force and totalitarianism. This is no longer virtue, but powerlessness.

Second, this confusion leads to another. If what is moral ought by that fact to be legal, it follows that what is legal is by that fact also moral. In common speech, if it is not against the law, it is all right.[33] Here the confusion is complete. Law is deprived of all true sanction from the order of morals.[34] Morality is invoked to sanction any kind of law. As a result, both law and morality lose all meaning. This is why juridical positivism can

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abstain.

SUMMA THEOLOGICA I-II, q. 96, art. 2.

33. This is a popular interpretation of Holmes' positivist philosophy. The real Holmes is much more nuanced than this original caricature. "The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it . . . tends to make good citizens and good men." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897). Aquinas would not disagree.

34. This became evident in the aftermath of Roe v. Wade, 410 U.S. 113 (1973). Gallup polls before the decision showed 50% of those polled opposed abortion on demand. THE GALLUP OPINION INDEX REP. No. 54 at 19 (Dec. 1969). One year after the *Roe* decision the number opposed had dropped to 44%. THE GALLUP OPINION INDEX REP. No. 106 at 24 (Apr. 1974). By May of 1978, only 19% of those polled thought abortion should be illegal in any circumstance. THE GALLUP OPINION INDEX REP. No. 153 at 26 (May 1978).

find no real argument with the former Nazi judges. They "enforced the law" because the law had perfect validity; because the judiciary only enforces valid law, the judges had no choice but to commit the legal atrocities. If this reasoning seems somewhat repugnant, it is because juridical positivism has no other answer; it recognizes only validity, never morality, as an appeal to some higher moral norm. Americans should not be surprised at the judges' response at Nuremberg, because this was the response of all the eminent American jurists of the early and middle nineteenth century concerning slavery.

American jurisprudence always has had particular difficulty with the relationship between law and morals, between internal and external standards. It was Mr. Justice Holmes who identified "internal" with "moral," and "external" with "objective." Thus, he gave moral standards only private application, and legal standards only public application. Accordingly, moral standards and legal standards become mutually exclusive. Nowhere in Holmes do we find any endeavor to relate the two—which accounts for his impoverished definition of law:

> It seems to me clear that the *ultima ratio,* not only *regum* but of private persons is force, and that at the bottom of all private relationships . . . is a justifiable self-preference.[35]

Holmes may have feared that to grant moral standards the same status as legal standards would have forced an assimilation of law and morality. But this is to mistake the relationship: legal and moral standards are both external because an inner process stands in need of outward criteria. Some inner culpability always is implied in the criminal law because that is what a community does in establishing a criminal law in the first place: it forbids certain actions because it considers them morally wrong and those who do them, morally culpable. Even Holmes admits as much:

> Criminal liability, as well as civil, is founded on blameworthiness . . . . A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear.[36]

It is for failure to relate internal and external standards that Holmes' definition of law appears so impoverished.

The first requirement of any sound body of law is that it

35. O.W. HOLMES, THE COMMON LAW 38 (M. Howe ed. 1963).
36. *Id.* at 42.

reflect the needs and desires of the people. This axiom, of course, must be joined immediately with another, which is that law must be, and appear to be, fair and just to the people for whom the law is passed. The task of jurisprudence is to relate the "internal" virtue of fairness and justice to the "external" embodiment of these virtues in the law. Holmes could never relate these moral notions to his "objective" legal rules.

Although he did not deal with it in any depth, Holmes did at least see the problem. He fought the notion of law in Austin who defined law simply as the will of the sovereign.[37] For Austin, the sovereign relies on "private" standards for his commands—the major reason Holmes opposed the whole notion of "private" moral standards. Thus, Holmes built his theory of legal standards on the idea that objectivity can be gained only through intersubjective agreement among members of a community. This is known today as a consensus on the moral values that can and should be translated into public law by the community's legislators. Holmes sowed the seeds of an interrelation between internal and external standards, but unfortunately he never developed them in a consistent way. In this sense, Holmes cannot be truly termed a juridical positivist, yet it was his fear of "internal" norms, at least as used by Austin, that accounted for his failure to relate the two within a total and external consensus of the community on the moral dimension of law itself. Holmes failed to give a soul to the whole body of law.

SOME CONCLUSIONS

Law and morality are indeed related, even though differentiated. The premises of law ultimately exist in morality. Human legislation looks to the moralization of society, which is a datum, not an imposition. But, mindful of its own nature and mode of action, law must not moralize excessively lest it defeat even its own more modest aims by bringing the law into contempt. Thus, in a free society law depends essentially on the people's moral sense.

The law, therefore, mindful of its nature, must tolerate many evils that morality condemns. A moral condemnation regards only the evil itself. A legal ban on an evil must consider what St. Thomas calls its own "possibilities."[38] That is, will the ban be

37. J. AUSTIN, LECTURES ON JURISPRUDENCE 90-94 (1873).

38. SUMMA THEOLOGICA I-II, q. 91, arts. 4 & 5.

obeyed by the generality? Will the moral sense of the community, *ut in pluribus,* morally condemn this act? Is it, therefore, enforceable against the disobedient? Is it prudent to enforce this ban, in view of the harmful effects in other areas of social life? Is the instrumentality of coercive law a good means for the eradication of this or that social vice? These are the questions that jurisprudence must answer if legislation is to be drawn with requisite craftsmanship.

Civil society demands order. In its highest phase of freedom, it demands that order should not be imposed from the top down, but should flower outward from free obedience to restraints and imperatives stemming from inwardly possessed moral principles. In this sense, law is more than an executive and valid order backed by force; it is a spiritual and moral enterprise, and its success depends upon the virtue of the people who are called upon to obey it.

Men who would be politically free must discipline themselves. Political freedom is endangered in its foundations as soon as the universal moral values, upon whose shared possession the self-discipline of a free society depends, are no longer vigorous enough to restrain the passions and shatter the selfish inertia of men.[39] The force of law, the sanction of the law, is not in the sheer

39. This relation of basic, objective moral norms and law was one of the principal points of the controversial speech delivered by Alexander Solzhenitsyn at Harvard University, Cambridge, Massachusetts, on June 8, 1978. Solzhenitsyn, *A World Split Apart, reprinted in* 44 VITAL SPEECHES OF THE DAY 678-84 (Sept. 1978). When Solzhenitsyn remarks that in the West "the letter of the law . . . is considered to be the supreme solution" to conflict and that "everyone operated at the extreme limit of the legal frames," his objection goes to the heart of America's constitutional arrangements. The reliance is on institutions instead of the formation of character by and through virtue. What is the alternative for Solzhenitsyn? It is moral education that teaches reason to rule the passions. The modern reliance on institutions, commerce and other substitutes for virtue implies a separation of law and morality where there should be only a distinction. So Solzhenitsyn sadly concludes that "everything beyond physical well being and accumulation of material goods, all other human requirements and characteristics of a subtler and higher nature, [are] left outside the range of attention of the state and the social system."

The present peril of the West, its weakness and uncertainty, may be traced to "the very basis of human thinking in the past centuries," what Solzhenitsyn calls "rationalistic humanism or humanistic autonomy: the proclaimed and enforced autonomy of man from any higher force above him." He continues: "On the way from the Renaissance to our days we have enriched our experience, but we have lost a concept of a Supreme Complete Entity which used to restrain our passions and our irresponsibility." This loss—of the idea of God, or of natural law in the classical understanding—is the "real crisis" of our time, for "the split in the world is less terrible than the fact that the same disease plagues its two main sections." (Russia and the United States).

What he is saying is that in losing its spiritual bearings, a society "which is based on the letter of the law and never reaches any higher is scarcely taking advantage of the high

fact that it prevails, but in its rightness. A human society is inhumanly ruled when it is ruled only, or mostly, by fear or force. The generality obeys good laws because they are good laws; they merit and receive the community's consent as valid legal expressions of the community's own convictions regarding what is just or unjust, good or evil. In the absence of this consent, law either withers away or becomes tyrannical. It is the function of prudence in the organs of authority to provide for these ends (*jurisprudence*). The delicate balance between individual rights and social peace resides, in the final analysis, not in courts or legislatures, but in the people's moral sense. At least in a democracy, it resides in the people's capacity to sacrifice for the common good, a capacity termed "virtue."

Law reflects the community's moral consensus, and no law can substitute for the soul of a society. Democracy precariously balances individual rights and social responsibility. It expresses itself in the legal order that, in turn, is founded on the moral capabilities of its people. Democracy is as strong, and as weak, as this basic capability.

Jurisprudence must reconcile this essential relationship between law and enduring moral norms. If it be denied that there are any such norms the basis of any communality becomes tenuous at best and dangerous at worst. Respect of law and allegiance to law depends on how we answer this crucial question.

The decline of official government today in its democratic form has a consequence transcending the confines of politics and legality. In a secular age, men in the United States have expected and worked for salvation through the democratic republic that has given birth to a new secular religion, rather than through the Kingdom of God and its expectation. Their expectations have been disappointed at every level. The charisma of democracy, with its faith in rationality and virtue in the masses, has not survived the historic experiences of mass irrationality, the impot-

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level of human possibilities . . . . And it will simply be impossible to survive the trials of this threatening century with only the support of a legalistic structure." It is this emphasis on the spiritual, the insistence that there is something higher and more important than those things which our system has canonized, which has so disturbed Solzhenitsyn's critics. Where there is no higher obligation, where legality is the highest goal and nothing else is required, people are encouraged to operate "at the extreme limit of the legal frames . . . . An oil company is legally blameless when it purchases an invention for a new type of energy in order to prevent its use. A food-product manufacturer is legally blameless when he poisons his product to make it last longer; after all, people are free not to buy it." Thus, Solzhenitsyn has tersely summarized what has been said throughout these pages.

ence and corruption of democratic government. Its eschatological expectations have come to naught, leaving a broad and deep moral vacuum where there was once a firm belief and expectation, built not on firm and abiding moral values, but rather derived from rational analysis.

The new secular religion has given us no faith, no sense of expectation—only an emptiness. And no civilized government not founded on a faith can long endure.